

CASE NOTES by Mark Hunter

Giblin v Beach

Supreme Court No. 2001/67

Judgment of Bailey J delivered
9 August 2001

CIVIL PROCEDURE - SUBPOENAS - ORDER 42

On appeal from the Master of the Supreme Court of the Northern Territory.

Pleadings had closed in the subject medical negligence proceeding. A trial date had not yet been fixed. At the request of the defendant, four subpoenas were issued by the Court pursuant to O.42 of the Supreme Court Rules.

The subpoenas directed the production of medical records by non-parties. Most of these records were lodged with the Registrar prior to the date when the subpoenas were returnable before the Master. The plaintiff did not object to the defendant being granted access to the subpoenaed material, in the absence of notification being given within seven days of any claim of privilege made by the plaintiff.

On 14 June 2001, the Master refused both parties access to the documents, dismissed the subpoenas and ordered the return of the medical records to those who had produced them. He found that the defendant's actions were not a "proper use" of O.42, and that "...a subpoena should only be returnable for a hearing unless otherwise ordered by the court".

In making this unexpected determination the Master referred to the judgment of Martin CJ in *Mamone v Gagliardi* [2000] NTSC 95. In that case, the Chief Justice made similar orders in respect of subpoenas directed to non-parties. His Honour found that the subpoenas were applied for as part of nothing more than a broad attempt by the defendant to locate relevant evidence, prior to the fixing of a trial date. As such, the Court determined that the use of subpoenas represented an attempt to circumvent O.32, which deals with discovery from non-parties.



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Order 42.02 provides for personal attendance or production under subpoena "...at the trial or any other stage of the proceeding...".

HELD - The issue of the subpoenas was appropriate. The defendant had made no attempt to circumvent O.32.

Justice Bailey's judgment indicates a misinterpretation of *Mamone v Gagliardi* by the Master. The fact that a subpoena is made returnable on a date other than a date fixed for a "hearing" does not, in isolation, demonstrate an improper use of O.42.

Appearances

Appellant - Southwood QC / Morgan Buckley

Defendant - Not represented

NT Young
Lawyers
and NT
Women
Lawyers
Christmas
drinks

6 - 7.30pm at
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Tickets \$10

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